SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/05/2001

CLERK OF THE COURT
FORM L513

HONORABLE MICHAEL D. JONES

T. Pavia
Deputy

LC 2001-000203

FILED: _____

STATE OF ARIZONA

GARY L SHUPE

v.

DANIEL JOSEPH KOHLS

TREASURE L VANDREUMEL

FINANCIAL SERVICES-CCC
PHX MUNICIPAL CT
REMAND DESK CR-CCC

**APPEAL RULING / REMAND**

**Phoenix City Court**

**Cit. No. 5708771**

**Charge: Extreme Driving Under the Influence**

**DOB: 01-23-52**

**DOC: 11-13-99**

This Court has jurisdiction of this Appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the Phoenix City Court and the Memoranda of counsel.

On November 13, 1999, Appellant was charged with Driving While Under the Influence of Intoxicating Liquor in violation of A.R.S. Section 28-1381(A)(1); Driving With a Blood Alcohol Content in Excess of .10 within 2 hours of Driving in violation of A.R.S. Section 28-1381(A)(2); and Driving With a Blood Alcohol Content in Excess of .18 within 2 hours of Driving in violation of A.R.S. Section 28-1382(A), all class 1 misdemeanors. On March 26, 2001, Appellant plead guilty to the first 2 charges [A.R.S. 28-1381(A)(1) and (2)] and the parties agreed to submit the Extreme DUI charge in A.R.S. 28-1382(A) to the judge for a determination based upon stipulated evidence. The stipulated evidence consisted of exhibit 1: a packet containing the Intoxilizer service record, standard quality assurance procedures checklist for several dates pertaining to the Intoxilizer machine used, the Alcohol Influence Report filled out by the arresting officers (including Appellant's admission to drinking four beers), the Intoxilizer "GCI Strip" reading showing blood alcohol readings of .198 and .195, the implied consent affidavit acknowledgment, and the police departmental report describing the details of Appellant's arrest.

Appellant's argument is, essentially, that because the readings were .198 and .195 and the parties had orally stipulated that there was a plus or minus 10% possible instrument error factor, that the Court could not have convicted Appellant of the Extreme DUI charge. However, Appellant presumes that the plus or minus 10% occurs in every case. This is factually incorrect. The error factor is plus or minus 10% at its extreme. The trial judge looked at other information in exhibit 1 to find that the Intoxilizer 5000 was operating correctly.

When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[1] All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.[2] If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.[3] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[4] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[5] The Arizona Supreme Court has explained in *State v. Tison*[6] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[7]

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[1] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v.Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

[2] *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

[3] *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

[4] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).

[5] *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

[6] SUPRA.

[7] Id. At 553, 633 P.2d at 362.

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This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence.

IT IS ORDERED affirming the judgment of guilt and sentences imposed imposed.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for future proceedings.